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Chairman: Mr. Mochochoko ..... (Lesotho)

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The meeting was called to order at 12.10 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10)

1. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, said that those countries agreed with the Commission that diplomatic protection was a topic of great practical significance which was ripe for codification and on which there was already a sound body of legislation. The rules of diplomatic protection were closely related to those governing both relations between States and traditional public international law; they clarified the division of competence between States and helped to ensure respect for international law as it related to the protection of foreign nationals in a host State, without prejudice to any other relevant legislation.

2. Diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned and, as such, provided for discretionary State powers. For all practical purposes, the person concerned was to be considered as a beneficiary of international law, without regard to theoretical assessments of whether or to what extent that person was a subject of international law. While diplomatic protection could not be assimilated to human rights, the two approaches might overlap in some cases. It was important to focus on practical rather than theoretical issues, and the Nordic countries hoped that the end result would serve as a guide to practitioners and would cover not only the issues indicated by the Commission, but also questions related to dual nationality, *inter alia*, with regard to the abduction of children, and the diplomatic protection of legal persons. He also stressed the importance of consular functions as distinct from diplomatic protection, although those institutions could play complementary and even overlapping roles.

3. With respect to nationality in relation to the succession of States, the Nordic countries shared the Commission's hesitation as to the possibility of extending the topic beyond the context of State succession, noting that the overlap with the question of diplomatic protection would be considerable. On the other hand, a more limited study would be warranted only if it addressed practical problems faced by States. The future of the topic therefore rested in the hands of Governments in a position to share their practical experience of State succession as it affected the nationality or status of legal persons; in the absence of comments in that regard, the Commission might do better to turn its attention to other issues.

4. **Sir Franklin Berman** (United Kingdom) said that in celebration of the Commission's fiftieth anniversary, the United Kingdom had hosted a two-day discussion between several members of the Commission and a group of British experts on international law, focusing on the role and agenda of the Commission. In that regard, he drew attention to a recent study of the Commission's future work published by the British Institute of International and Comparative Law.

5. The Commission was the sole body of its kind and the only one capable of taking a comprehensive view of the international legal system. While nominated by Governments and elected by the General Assembly, its members served in a personal capacity, thus retaining an element of independence which was a defining characteristic of the Commission. Moreover, more recently established international lawmaking bodies were typically composed of specialists in specific fields, some of whom were not experts in international law. The relationship between the Commission and the Committee, which represented the Governments of Members States, was therefore fundamental to the future work of the Commission.

6. He thanked the Secretariat for making available at an early stage the sections of the report summarizing the work of the Commission's 1998 session and listing points on which States were requested to comment. Although his own Government had been unable to prepare adequate replies in the absence of the sections of the report to which the requests related, the new procedure was worthwhile and he hoped that it would be improved on. He also considered that the decision to divide the Commission's session into two parts deserved further trial and that it might be useful to continue to hold one part of the session in Geneva and the other in New York as had been done in 1998.

7. The Commission's new approach to the prevention of transboundary damage had been a success, as shown by the adoption of a set of 17 draft articles with commentaries. In light of those articles, he suggested that the instrument's title should be changed in order to emphasize the underlying notion of environmental damage inherent in the reference to harm caused through physical consequences. Furthermore, while he agreed that the duty of prevention was an obligation of conduct, it was important to remember that within the normal framework of State responsibility, consequences could nevertheless stem from the breach of such an obligation. In that regard, as with the topic as a whole, he thought that the draft articles should be practical rather than theoretical in nature.

8. On the topic of diplomatic protection, his delegation was perplexed or even disappointed. The idea put forward

by the Special Rapporteur that diplomatic protection should be recognized not as an inter-State institution of international law but as an arrangement under which the State acted as agent for its injured national would not be codification at all but a radical reformulation and it was hard to see what benefit would flow from it. On that subject, his delegation endorsed the remarks made by the representative of Switzerland and by the representative of Norway, speaking on behalf of the Nordic countries. The Commission should pursue the seven points agreed by the Working Group as listed in paragraph 108 of the Commission's report.

9. On the subject of unilateral acts of States, his delegation was rather more hesitant at the current stage than it had been at the outset. The preliminary report and its discussion in the Commission appeared to leave the topic at once both too narrow and too broad. His delegation would encourage the Commission to focus its preliminary studies far more closely on the main practical problems that needed to be examined. Without that as a basis for future decisions, it was doubtful whether the Sixth Committee would be in a position to decide whether detailed work on the topic would be well-founded or feasible.

10. The Commission had approached its second reading of the draft articles on State responsibility with both intellectual rigour and an appreciation of the practical context within which the rules of responsibility actually operated and the constraints of the timetable.

11. The informed debate on the subject of State "crimes" made especially interesting reading. The Commission had asked, in paragraph 35 of the report, whether all conduct of an organ of a State was attributable to that State under article 5 of the draft articles, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct. In the view of his delegation, the short answer to that was "yes". The question whether acts were attributable to the State was independent of the question of the nature of those acts. All acts of an organ of the State, when acting officially, were attributable to the State. There was no relationship, as the terms used in the question might suggest, between whether an act was attributable to a State and whether the State enjoyed immunity from the jurisdiction of foreign courts.

12. The Commission had also asked, in paragraph 36, about the appropriate balance to be struck in Part Two of the draft articles between the elaboration of general principles and of more detailed provisions. In the view of his delegation, the approach in the current draft was prone to weaknesses of both excessive generality and misplaced specificity. For example, draft article 42, paragraph 2, specified that reparation was to be determined having regard to "the negligence or the wilful act or omission" of the injured State or its national. Other factors, such as the nature of the rule violated or the wilfulness of the injuring State, were not mentioned. It would be preferable either to eliminate such selective specificity or to offer a more comprehensive draft.

13. From the point of view of clarity of the law, detailed regulations might be preferable. However, detailed and comprehensive consideration of the law on separation, compensation and so on would take a considerable time and would delay the completion of the Commission's work on State responsibility. Those topics would, moreover, lend themselves to a separate study, firmly rooted in the examination of State practice. If that approach was taken, it would be necessary to ensure that the provisions in the draft articles on State responsibility did not prejudice the results of any further study of the topics. Those questions of detail versus generality were linked to the question of the final form of the draft, which the Commission still had under consideration.

14. Turning to the question of nationality in relation to the succession of States, he said that his delegation shared the scepticism about the need to confront the nationality of legal persons in that context. The final views of his Government would, of course, be influenced by those of Governments which had undergone a recent succession of States and its consequences.

15. The work of the Commission on the topic of reservations to treaties could serve the real and pressing needs of Governments in their daily business, and could do so even without an exercise in formal codification. His delegation had some reservations, however, about the definitional exercise on which the Commission seemed to have embarked. The definitional exercise contained the hidden trap of presuming that because something had been defined, therefore it existed in a legally relevant sense. Some caution might be due, for example, as to whether so-called "interpretative declarations" were really a separate legal category or just a convenient portmanteau reference for statements that did not amount to reservations. There was also a question as to how far solving the conundrum of whether "interpretative declarations" had legal effect of any kind (and if so, what) was a necessary part, or at least a priority part, of what the General Assembly had asked the Commission to do. The exercise did seem to have flushed out one or two points of importance, but they were points of legal substance, not of pure definition.

16. **Mr. Yamada** (Japan) said that the Commission's experiment with a split session had been a success, as shown

by the fact that the Commission had completed both a set of 17 draft articles on prevention of transboundary damage from hazardous activities and draft guidelines on reservations to treaties. He suggested that in future, the Commission should hold 10 rather than 8 meetings per week, as it had in New York, thereby shortening the total length of its sessions by one week for every six. It had also been useful for the legal advisers of New York Missions to observe the Commission's work and meet its members. It was regrettable that financial constraints made it impossible for the Commission to continue to meet in split session, and he hoped that the budget for the next biennium would provide funding for it to resume that practice.

17. The fact that the Commission had been able to complete the draft articles on prevention of transboundary damage from hazardous activities in only one year validated its decision to pursue the issue of protection in preference to the broader topic of international liability. Generally speaking, his delegation approved of the draft articles, and he urged the Committee to ask Governments to submit their comments expeditiously so that the Commission could complete its second reading of the draft by the end of the current quinquennium.

18. In reply to the questions raised by the Commission in chapter III (c) of the report (A/53/10), he said that, irrespective of whether States fulfilled their obligation of prevention, the nature of the activities involved would always entail the possibility of significant transboundary harm. Accordingly, the obligation of prevention was one of conduct, not of result, and failure to comply with that obligation fell into the realm of State responsibility. A distinction must be made between international liability for significant transboundary harm and State responsibility, although in some cases such harm could be partially attributed to failure to comply with the obligation of prevention.

19. The role of dispute settlements depended on the form which the draft articles would ultimately take. While his delegation had no firm views on the matter, it considered that a framework convention might be most appropriate; in that case, the Convention on the Law of the Non-navigational Uses of International Watercourses offered appropriate dispute settlement procedures. Because liability would require a separate regime for each category of hazardous activity, residual rules would be of little use. Furthermore, it would be premature to embark on identification of activities which caused significant harm without a precise definition of the scope and content of the final instrument. Further consideration of that topic should be postponed until the Commission had considered the issues relating to international environmental law mentioned in paragraph 43 of the report.

20. With regard to diplomatic protection, he said that the legal personality of individuals under international law, though limited, had been gradually recognized, particularly in the case of the consideration of individual complaints by international human rights treaty bodies. He commended the Special Rapporteur for striking a balance between the traditional institution of diplomatic protection and recent developments in international law regarding the legal status of individuals. However, his delegation was not in favour of deviating from the basic principle of diplomatic protection embodied in the *Mavrommatis Palestine Concessions* case, in which the Permanent Court of International Justice had stated that "once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant". He doubted that States would recognize that, under general international law, an individual would have such legal personality as to lodge a claim directly against a foreign State through international dispute settlement procedures. Furthermore, some issues related to diplomatic protection, such as the exhaustion of local remedies, must also be examined from the point of view of State responsibility. Lastly, his delegation considered that it was important to avoid abstract discussion of the distinction between "primary" and "secondary" rules, although it favoured a focus on the latter.

21. **Mr. Orrego Vicuña** (Chile), referring to chapter IV of the report, said that the focus on prevention in the draft articles was correct. That was undoubtedly the proper way to address issues relating to environmental law. It was obvious, however, that the focus on prevention did not preclude liability in cases where prevention was not carried out. There was a clear link between the topic and other well-established principles of international law, such as the "polluter-pays" principle and the principles of intergenerational equity and shared but separate liability. Similarly, the approach taken in article 1 of stating only that the draft articles applied to activities not prohibited by international law, without listing them in detail, was also highly appropriate and reflected the approach taken in domestic law.

22. The scope of the draft was limited to transboundary damage caused in another State; it was understood that the affected State could take action to enforce international liability for the failure to take preventive measures. It was clear, however, that the type of damage involved usually affected common spaces, as in the case of marine and atmospheric pollution. His delegation proposed that the Commission should explore the feasibility of an entity or

institution being empowered to act on behalf of the international community in the event of damage to common spaces, perhaps through the establishment of a high commissioner on the environment, as had been suggested. The observer for Switzerland had raised an interesting notion in that connection by referring at a previous meeting to the concept of damage to ecosystems.

23. The draft referred to the concept of "significant harm", which was often used to establish a threshold beyond which damage was deemed to have occurred. At the same time, however, it could also serve as a threshold for the extinction of liability when the damage in question fell below a certain level. In that case, the burden of proof fell on the party invoking the extinction, not on the victim of the damage. That was important, because one of the major efforts being made in the field of environmental law was to reverse the burden of proof so that it fell on the alleged perpetrator, not on the alleged victim.

24. The "due diligence" criterion was interesting in that it diverged from a subjective approach and implied a degree of objective assessment. Many internationally accepted principles and standards, such as those contained in the International Maritime Organization conventions, constituted a form of international codification of the due diligence principle, which pointed towards forms of objective or strict liability.

25. While the draft referred to the need to involve the operator of the activity, it did so indirectly, for example, in relation to the costs of prevention (para. (16) of the Commission's commentary to draft article 3). It was important, however, that the operator should be linked more directly to a liability regime, together with the State, insurance carriers, special funds, and so on.

26. While the notion of prior authorization was certainly important, it should be borne in mind that only certain types of activity were subject to an environmental impact assessment under domestic law; for that reason, the criteria should be narrowed to some extent. His delegation noted with concern that prior authorization was also required for pre-existing activities; that could give rise to major problems with regard to acquired rights and foreign investment, possibly even leading to international claims.

27. His delegation noted with satisfaction the provisions in the draft articles relating to impact assessment procedures, information and consultations and, in particular, individual access to the courts in accordance with the principle of non-discrimination.

28. Lastly, his delegation suggested that the notion of prevention should be linked to the obligations of response action and rehabilitation, which should also apply to the operator of the activity. Failure to comply with those obligations could give rise to international liability regardless of the damage caused. At the same time, the impact of the damage should be taken into account in assessing the liability incurred. To that end, the Special Rapporteur should in the future examine ways of assessing environmental impact.

29. Turning to chapter V of the report, he said that the Special Rapporteur had correctly identified one of the major issues relating to the topic, namely, whether the rights involved in diplomatic protection belonged to the State or to the individual. While it was clear that the right to invoke diplomatic protection belonged to the State, the right itself, as suggested in the Special Rapporteur's report, belonged to the individual. As views on that subject had evolved a great deal over the past 30 or 40 years, his delegation believed that the question should be considered not only from the standpoint of customary law, but also in the light of current practice.

30. It was also necessary to examine the consequences of that shift in perspective for individual rights. Three such consequences could already be observed: first, presentation of a claim of diplomatic protection was not always left to the discretion of the State; in many cases, there was an element of compulsoriness; second, distribution of the compensation obtained was not always left to the discretion of the State; and third, the damage invoked in claims presented by the State did not always differ from the damage sustained by the individual. The shift in perspective was evident, for example, in bilateral investment protection treaties and the International Centre for Settlement of Investment Disputes (ICSID) Convention. In current practice, the State most often acted as the agent of the individual in providing a channel for an international claim where no direct channel existed.

31. Other specific problems arose in the area of nationality. Claims were not always presented on behalf of nationals; in many cases, they were presented on behalf of non-nationals and even of nationals of the wrongdoing State. That could be seen, for example, in the practice of the United Nations Compensation Commission. There were no longer any firm requirements with respect to continuity of nationality in the context of diplomatic protection; cases involving dual nationality were leading to a much more flexible criterion. Another very important question concerned the protection of corporations and shareholders. International practice showed that the criterion applied in

the *Barcelona Traction* case, which prohibited action by individual shareholders, no longer prevailed.

32. **Mr. Abraham** (France) said that his remarks would focus on the topic of diplomatic protection. He noted that for the Special Rapporteur, the main question was who held the right exercised by way of diplomatic protection – the State of nationality or the injured victims. In the view of his delegation, the traditional conception of diplomatic protection – that the State, by taking up the case of one of its subjects, was asserting its own right – should be retained. The question whether the State that exercised diplomatic protection was protecting its own right or that of its injured national was a rather theoretical one, and might not be useful to the debate.

33. The exercise of diplomatic protection was a right of the State. To assert that right in a given case, the State took into account not only the interest of its national who had suffered injury because of a wrongful act of another State, but also a number of issues related to the conduct of its foreign policy. The exercise of diplomatic protection should be at the discretion of the State.

34. He had some doubts about the Commission's insistence on establishing a relationship between human rights and diplomatic protection. The Commission's work should not entail the assimilation of the two institutions or the establishment of a hierarchy between them. He questioned the usefulness of including the "human rights approach" in the study. The same criticism could also be made with regard to the draft articles on the nationality of natural persons in relation to the succession of States. That was not to say, of course, that the Commission should not study the rights covered by diplomatic protection, including human rights.

35. His delegation noted with satisfaction that the Commission had decided to confine its study to the codification of secondary rules, which were procedural in nature. In fact, his Government had serious reservations regarding the articles on State responsibility precisely because the Commission had not limited its study to the secondary rules. The Commission should establish as a precondition the existence of a wrongful act of the State, but its study should not extend to the content of the international obligation that had been breached.

36. The Commission should pay special attention to the rules on admissibility of claims and the prior conditions which had to be satisfied before claims were made. The Commission should not attempt to define the relationship between the nationality of natural or legal persons and the conditions under which such nationality had been granted. The Commission should not consider the question whether the individual had respected the law of the State in whose territory he or she was. It would be useful to stress the conditions under which the individual's behaviour might exempt the host State from responsibility.

37. The Commission should consider preconditions for the exercise of diplomatic protection. The first precondition would not appear to present any particular problem. There must be proof that an injury had been inflicted on a national, that the injury was a breach of international law, that it must be imputable to a State, and that a causal link existed between the wrongful act of the State and the injury. The second precondition was somewhat more complex, i.e., that injured subjects must have been unable to obtain satisfaction through domestic remedies. The second precondition should be studied in the light of the development of international law and the options available to individuals who had suffered injury. The Commission should address the question as to whether the resort to an international body to protect human rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

38. The mechanism of diplomatic protection had been extended by analogy to claims brought by international organizations on behalf of their agents. That protection was comparable to the protection which States exercised on behalf of their nationals, and the Commission should include it in its study.

39. **Mr. Yin Yubiao** (China), referring to chapter IV of the report, said that prevention was an important aspect of the issues relating to transboundary damage. In order to protect the environment effectively, it was necessary to focus on preventive measures. Principle 2 of the Rio Declaration on Environment and Development stipulated that States must ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The principle of prevention had become an integral part of international environmental law; accordingly, the adoption of a set of articles on the subject was in conformity with current trends.

40. His delegation endorsed the concept that the draft articles should apply only to activities which involved the risk of causing significant transboundary damage. In other words, prevention should not cover any legal activities which did not involve such a risk, even though they might actually have caused significant transboundary damage. Damage caused to the global commons did not fall within the scope of the topic. His delegation had no objections to the provisions on prior authorization, notification and

information, exchange of information and factors involved in an equitable balance of interests, which were the result of extensive prior discussion.

41. Further consideration should, however, be given to former article 3 on freedom of action and the limits thereto, as contained in the original draft submitted by the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/50/10, annex I). The original article stipulated that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited and was subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. While the article did not require States to guarantee that they would not cause transboundary damage, it did require them to adopt all necessary measures to prevent or reduce such damage. Accordingly, the draft article was highly meaningful and should be the basis for other articles relating to the topic.

42. Another drawback of several of the draft articles was the absence of provisions embodying the need to pay due attention to the special conditions of the developing world. Economic development was the top priority for developing countries. The pursuit of environmental goals placed an enormous and sometimes unbearable burden on their economic development. The well-being of current and future generations, and domestic and international interests, should be taken into account in the provisions dealing with environmental protection and resource development. In that context, global partnership should be promoted to enable the developing countries to fulfil their obligation to prevent transboundary damage both for their own benefit and for the common good. To that end, it was necessary to promote technology transfers on equitable terms, develop a common fund for financial support and provide training and technical cooperation. While both the current and the previous Rapporteur had raised the point of enhancing the technological capacity of the developing countries, it was not reflected in the current draft articles. It was to be hoped that the Commission would improve the text on second reading by implementing the principles set forth in article 6 of the Rio Declaration.

43. As the duty of prevention was treated as an obligation of conduct, failure to comply without causing any damage would not entail liability. If, however, damage had been caused, either State responsibility or civil liability, or both, were involved and must be brought to bear on the State of origin and on the operator. On the other hand, if damage had been caused despite compliance, the operator must bear the liability. Since the Commission had decided to separate the prevention regime from the damage liability regime as an independent system without specifying the connection between the two, as indicated in the original topic, it remained unclear how liability for damage should be addressed after consideration of the draft articles on prevention had been completed.

44. **Mr. Andrews** (United States of America), referring to the Commission's work on international liability for injurious consequences, noted with satisfaction that the Commission had rapidly developed and approved on first reading a set of 17 articles on preventing transboundary damage from hazardous activities, which drew significantly on the new United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. His delegation welcomed the Commission's initiative in redirecting its work to focus on avoiding transboundary harm. It must be recognized, however, that the draft articles seemed to be premised upon a highly centralized State with comprehensive regulatory powers. It would be difficult or even impossible to implement those principles effectively in federal States like the United States, where regulatory authority was shared.

45. The avoidance of transboundary harm was a difficult topic. In addition to problems of implementation posed by differences in the structures of States, it was hard to strike the correct balance between the rights of States of origin and of States affected by transboundary harm. His delegation was not initially persuaded that the new draft articles always struck the correct balance.

46. His delegation appreciated the efforts made by the Working Group to establish an approach to the topic of diplomatic protection. For both States concerned in cases where diplomatic protection was invoked, the institution could provide an effective, generally understood mechanism for clarifying and enhancing compliance with international law.

47. He hoped the Commission would not take too narrow a view of its future work on unilateral acts of States. While it could be useful to consider the legal effects of declarations and other formal statements intended to have legal consequences, problems could arise precisely because it was not always clear whether particular words or actions were intended to have such consequences. His delegation urged the Commission to broaden the scope of its work and not to confine itself to unilateral statements clearly intended to have legal effects.

48. His delegation did not think that the Commission's future work should extend to the unilateral acts of international organizations, which did not seem to be an

issue of practical consequence. If the unilateral acts of international organizations were included, their treatment should be limited in scope.

49. The issue of State responsibility was the most important and difficult topic on the Commission's agenda. His delegation was pleased that the Commission had adopted several of the Special Rapporteur's recommendations to clarify and simplify the draft articles, including the deletion of several unnecessary provisions. It endorsed the changes made to the texts of articles 4 and 5 to underscore that international law governed in the event of any conflict with internal law, and supported the Special Rapporteur's wish to give further study to reparations, including the important matter of interest.

50. His delegation did not believe that the notion of "crimes" should be included in article 19, inasmuch as that concept did not have a basis in State practice or judicial decisions. It did not belong in the law of State responsibility. When the Commission reverted to article 19, it should delete the concept of crimes.

51. Regarding nationality and succession of States, it was clear to his delegation that expanding the Commission's current work to add a comprehensive general study of legal persons in cases of succession would be useful.

52. Regarding reservations to treaties, his delegation appreciated the work of the Special Rapporteur and shared the Commission's overall view that the Vienna Convention on the Law of Treaties created a workable general regime for reservations applicable to all types of treaties. The Vienna regime did not require major revision; hence, the Commission's work should focus on filling in gaps and areas of possible ambiguity. The portions of the Commission's new guidelines containing the definition of reservations and interpretative declarations set out in paragraph 540 of the report seemed sound and useful.

53. With regard to the Commission's proposed topics for its future long-term work programme, his delegation was pleased to see that each of the topics proposed seemed clear and discrete. They should be easily completed with a few years' focused work.

The meeting rose at 1.30 p.m.